No. 15,151

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended,[1] for enforcement of its order (R. 47-50)[2] issued against respondent on January 9, 1956. The Board's decision and order are reported in 115 NLRB No. 9. This Court has jurisdiction of these proceedings

[1] 61 Stat. 136, 29 U.S.C., Sec. 151, et seq. The relevant statutory provisions are reprinted *infra*, pp. 23-26.

[2] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

under Section 10(e) of the Act, the unfair labor practices having occurred at Glendora and Stone Canyon, California, within this judicial circuit.[3]

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondent, International Union of Operating Engineers Local 12 (the Union), violated Section 8 (b) (4) (A) of the Act by inducing and encouraging employees to refuse to perform services for their employers with an object of forcing such employers to cease doing business with Crook and Shepherd, with whom the Union had primary disputes. The Board further found that the Union violated Section 8 (b) (4) (B) of the Act in that another object of such inducement and encouragement was to force Crook and Shepherd to bargain with the Union as the representative of their employees without its having been certified as such representative. The Board based these conclusions upon the following evidentiary facts:

A. The Union Action Respecting Crook Company

1. *The Union loses an election among Crook's employees, and then causes employees of a Crook customer to stop work*

On February 17, 1955, the Union placed pickets at the yard of Crook Company in Los Angeles. They were

[3] The employers Crook Company, a corporation, and Shepherd Machinery Company, a partnership, each doing business at Los Angeles, California, sell and service construction equipment (R. 5-6; 113, 117, 121). Crook's annual purchases and sales across state lines exceed $900,000 and $100,000 respectively, while those of Shepherd exceed $1,000,000 and $100,000 respectively (R. 5-6; 113, 114-115, 122-123). On these facts, both businesses are clearly subject to the Board's jurisdiction.

removed on March 3, when Crook and the Union entered into a consent agreement providing for a Board-conducted election to determine whether Crook's employees desired the Union as their representative (R. 6, 32, 41; 117-118, 149, 151). On March 9, Crook's employees voted against representation by the Union. Thereupon the Union restored its picket line, and there has been intermittent picketing of the Crook premises ever since (R. 41, 6; 117-118, 149-150, 151).

On March 30, Fred Neuenschwander, an employee of Crook, went to the job site of Crowell & Larson in Glendora, California, to adjust some machines obtained from Crook. The Union's business representative, Joseph Mussro, came over to interrogate Neuenschwander (R. 8, 32; 71-73, 84, 119, 79-81, 218). Upon learning that Neuenschwander was working for Crook, Mussro asked whether he had come through the Union's picket line at the Crook premises (R. 8, 32; 73, 75, 81, 91). When Neuenschwander admitted that he had done so, Mussro first told him to leave the site, but then recanted his instruction (R. 8, 32; 73, 75, 81, 91). Speaking loudly enough to be heard by the Crowell & Larson employees who had gathered some 18 feet away and were having lunch, Mussro announced that Neuenschwander could finish his job, but that "we are not going to work" (R. 8, 32; 73-74, 77-78, 81, 91-92).

The lunch period ended at 12 noon. Fifteen minutes later Neuenschwander completed his work and left (R. 8; 72-73, 75-76, 79). The Crowell & Larson employees did not return to their operations at the end of the lunch recess but engaged in conversation with Mussro (R. 8; 33, 75-76). He told the men that, since the Union was picketing Crook, they might not prop-

erly work while a Crook employee fixed equipment at their job site (R. 9, 34; 80, 82, 91). Mussro also warned Foreman Dias, who wanted to resume work, to stand aside or he would close the operation down, and the foreman yielded (R. 34; 98). Noticing that the equipment was new, he next asked whether it had come through the picket line. Failing to get the desired information, he took down the serial numbers of the machines, and threatened that, if he found they had actually passed through, he would come back and "shut down tight" (R. 9, 34; 92-93, 82).

At five minutes to one, Mussro, about to leave, told the Crowell & Larson employees that they might return to work (R. 9, 34; 83, 88-89, 92-93). Their employer later docked each man for the hour's unauthorized shutdown after the lunch period (R. 9, 34; 94-95, 97).

2. *The Union requests a bargaining conference, but avoids another Board-conducted election*

On May 11, the Union sent Crook and other equipment distributors in the area a letter which it had signed jointly with a local of the Teamsters' Automotive Workers (R. 41; 155-156, 158-159). The signatories stated that they had been seeking an "Agreement" with these employers for several months but had been making no progress. They went on to ask that each firm send a representative to a meeting at a stated place on May 16 "for the purpose of entering into negotiations with the unions involved, to conclude a workable Agreement" (R. 42; 158-159).

To resolve this representation question, on May 16 Crook and the other employers petitioned the Board to conduct representation elections (R. 42). The next day, the Union wrote the Board that it did not claim to repre-

sent an employee majority in any of the units set forth in the employers' petitions (R. 42; 146-148, 152-153).[4] But, a week later, in spite of this disclaimer, J. H. Seymour, personal representative to J. H. Bronson, the Union's business manager, called Crook's principal stockholder, W. G. Crook, and asked for an appointment. He explained according to Crook's uncontradicted testimony, that "he would like to make an agreement with us and a contract as to our labor situation" (R. 42; 152).

B. The Union action respecting Shepherd Machinery Company

1. *The Union asks to negotiate with Shepherd, but avoids a Board-conducted election*

In January 1955, the Union informed Don C. Montgomery, Shepherd's general manager, that it "would like to establish a contract with the Shepherd people" (R. 45; 126). During March and April, Union Business Manager Bronson and Seymour, Bronson's personal representative, discussed a contract with Montgomery several times (R. 45, 14; 127). In one conference, they presented an agreement in effect at a similar operation and asked that Shepherd contract on the same terms (R. 45; 127). When Montgomery replied with the suggestion that the Union seek a Board elec-

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[4] The Board subsequently dismissed Crook's petition in this proceeding on the ground that a valid election had been conducted among Crook's employees within 12 months prior to the filing of its petition. (See p. 3 *supra*, and Section 9 (c) (3)). However, there being no such bar insofar as the other petitions were concerned and concluding that the Union's disclaimer of a representative interest was not *bona fide*, the Board directed elections on the other employer petitions. *Casey-Metcalf Machinery Co.*, 114 NLRB 1520.

tion to establish the fact that it actually represented Shepherd's employees, the Union answered that "no election was desired, as far as the Union was concerned," and dropped its effort to negotiate (R. 45, 46, 15; 127-128).

Shepherd itself then filed a representation petition with the Board on April 8, but on April 15 the Union filed a disclaimer of any interest in representing the employees. The Board's Regional Director thereupon dismissed the petition (R. 45, 16; 129-130).

The Union, however, continued to seek representative status among Shepherd's employees. It sent the employees mimeographed invitations to attend a scheduled meeting to discuss representation (R. 45; 129-130). On May 11 it included Shepherd among the employers to whom it sent its joint letter, mentioned above (p. 4), in which it asked these employers to send representatives to a conference which it had scheduled for the purpose of negotiating an "Agreement" (R. 45; 130). The letter pointed out that the signatories were seeking a general conference because W. W. Shepherd, of the Shepherd firm, had been acting for the group of employers but the Union had found that in dealing with him "it was evident that we could not proceed and enter into negotiations" (R. 41-42; 158-159).

To clear up the representation situation which the Union consistently refused to resolve, Shepherd filed a second representation petition on May 15 (R. 45; 129, 130), which was followed by and consolidated with the other petitions described above (p. 4). However, when the Union, on May 17, filed a disclaimer of interest in the proceeding, Shepherd withdrew its petition (R. 45-46; 130).

About May 23, the Union began picketing Shepherd's

premises (R. 46, 14; 124). At first its signs read "This firm is non-union"; later they alleged that Shepherd was "unfair to organized labor" (R. 14; 124). The Union picketed continuously until a few weeks before the Board hearing, and intermittently thereafter (R. 46; 124, 150).

2. *The Union causes employees of a customer of Shepherd to stop work*

On May 24, 1955, Ralph Sterling and a helper, employees of Shepherd, drove in a Shepherd pick-up truck to the job site of McCammon-Wunderlich in order to repair some equipment Shepherd had furnished (R. 17, 36; 52-53, 59, 60, 65-66, 125-126). Red Hunter, the Union's steward on the job, seeing the truck, asked Sterling whether the Shepherd shop was being picketed and Sterling said that it was (R. 17, 36; 54, 61, 66). Sterling, in answer to Hunter's next question, told Hunter that he intended to work there, whereupon Hunter replied that, if this were so, he would close the job down (R. 17, 36; 55). Hunter then drove about the project giving the men a "thumbs-up" signal to stop work (R. 17, 36; 56, 62, 64). Obediently, the equipment operators dropped what they were doing and collected at a central point (R. 17, 36; 56-57).

Hunter explained, in the presence of McCammon's carpenter foreman, James Green, that the job was shut down because a Shepherd truck was on the site, and then proceeded to order a crane operator to drop his load or be fined $100 (R. 18, 38; 61-62). Green advised the employee to yield to Hunter's order (R. 18, 38; 63).

Waggoner, McCammon's superintendent, informed of the work stoppage, told Sterling to leave (R. 17, 36-37; 57, 58-59, 66). He then advised Hunter that Shep-

herd's man was going and that the steward could therefore tell the others to go back to work (R. 17, 37; 67). Hunter instructed the employees to resume operations, the stoppage having lasted from 20 to 45 minutes (R. 17, 37; 58, 63, 67, 70-71). Thereafter, Waggoner telephoned Seymour, the personal representative of Union Business Agent Bronson, at the Union hall, and protested the work stoppage (R. 17, 38; 67). Seymour replied that, since there was a picket line at the Shepherd shop, McCammon could not have Shepherd people on its job, Shepherd employees might not even service the equipment as required under Shepherd's warranties, nor might McCammon buy parts from Shepherd (R. 17-18, 38-39; 68).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found that the Union induced and encouraged employees of Crowell & Larson and of McCammon-Wunderlich to refuse to perform services for their employers with an object of forcing or requiring these employers to cease doing business with Crook and Shepherd respectively, thereby violating Section 8(b)(4)(A) of the Act. The Board further found that an additional objective of this union activity was to force Crook and Shepherd to bargain with the Union as the representative of their employees without having been certified as such representative, in violation of Section 8(b)(4)(B) (R. 31-32, 39, 40, 41, 45, 46).

The Board's order (R. 47-50) requires respondent to cease and desist from the unfair labor practices found, and to post appropriate notices.

SUMMARY OF ARGUMENT

I

Substantial evidence supports the Board's findings that the Union, in violation of Section 8(b)(4)(A) and (B) of the Act, induced and encouraged employees of Crowell & Larson and of McCammon-Wunderlich to stop work for the dual object of (1) compelling these employers to cease doing business with Crook and Shepherd, and (2) of forcing Crook and Shepherd to recognize and bargain with the Union as the duly elected representative of their employees although not certified as such.

A. With respect to the Union's encouragement of a work stoppage by Crowell & Larson's employees, the evidence shows that, when Crook's employee appeared on the Crowell job site, Union representative Mussro instructed the Crowell employees to stop work until he left. The employees did so, resulting in a work stoppage of about one hour in duration. Union representative Mussro also took down the serial numbers of equipment which Crowell & Larson had just obtained from Crook, threatening to "shut down tight" if he found that they had come through the picket line which the Union had imposed at Crook's premises.

This work stoppage occurred in the midst of persistent efforts by the Union to secure recognition as the representative of Crook's employees without being certified as such by the Board. Thus, prior to the work stoppage, the Union had placed a picket line in front of Crook's premises, which was withdrawn when Crook agreed to a Board election, but reinstated as soon as the Union lost the election. Moreover, after the picketing resumed, the Union on at least two occasions requested

Crook officials to bargain with it concerning a contract for its employees.

B. As to the Union's inducement of employees of McCammon-Wunderlich, the evidence shows that a Union representative at McCammon's project, citing the Union's current picketing of Shepherd, directed McCammon's employees to stop work while a Shepherd employee was there to service equipment from Shepherd. The Union representative also threatened a crane operator with a heavy fine if he failed to obey the order. The Union thereafter ratified its representative's conduct, telling McCammon's superintendent that the work stoppage was directed against Shepherd, and that McCammon might have no dealings with Shepherd while the Union picketed that firm.

As with Crowell, this work stoppage occurred in the context of persistent efforts by the Union to obtain recognition from Shepherd without a Board certification. Accordingly, it is clear that the work stoppage had as its further object one prohibited by Section 8 (b) (4) (B), i.e., exerting secondary pressure on Shepherd to recognize the Union without a Board certification.

II

No substantial question is presented by the Union's contention that the Board erred in predicating its findings as to the amount of business done by Crook and Shepherd on the testimony of responsible officials of these Companies, who had first hand knowledge of their Company's operation and testified from such knowledge. *N.L.R.B.* v. *Haddock Engineers,* 215 F. 2d 734 (C.A. 9), relied on by the Union, is distinguishable on its facts.

ARGUMENT

I

Substantial Evidence Supports the Board's Finding that the Union Induced and Encouraged Employees of Crowell & Larson and of McCammon-Wunderlich Company to Refuse to Perform Services for Their Employers, in Violation of Section 8 (b) (4) (A) and (B) of the Act

Section 8(b)(4)(A) and (B) of the Act make it an unfair labor practice for a labor organization or its agents:

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment . . . to perform any services, where an object thereof is: (A) forcing or requiring any employer . . . to cease using, [or] handling . . . the products of any other producer, processor or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9; . . .

We shall show that the evidence fully supports the Board's finding that respondent, in violation of these provisions, induced and encouraged the employees of Crowell & Larson and of McCammon-Wunderlich to stop work with the objects (1) of compelling their employers to cease doing business with Crook and Shepherd, and (2) of forcing or requiring Crook and Shepherd to recognize and bargain with the Union as the

representative of their employees without having been certified as such under Section 9.

A. The Union's inducement of the employees of Crowell & Larson

The facts summarized in the Statement (pp. 2-4) show that, while the Union was picketing Crook's premises, Crook employee Neuenschwander went to the job site of Crowell & Larson to service some equipment that had been obtained from Crook. On seeing Neuenschwander, and learning that he was a Crook employee, Union business representative Mussro announced, within the hearing of Crowell & Larson's employees, who were members of the Union, that so long as an employee of Crook worked on equipment there, "we are not going to work." Thereupon, the Crowell & Larson employees suspended operations for an hour, returning to their jobs only after Neuenschwander had left and Mussro told them they might do so. At the same time, Mussro took down the serial numbers of the serviced machines, and threatened to "shut down tight" if he found that they had come through the picket line.

On these facts, it seems perfectly clear, as the Board found, that the Union caused the employees of Crowell & Larson to stop work, with an object of forcing Crowell & Larson to cease using equipment obtained from Crook or otherwise to stop dealing with that firm. Cf. *N.L.R.B.* v. *Washington Oregon Shingle Weavers District Council,* 211 F. 2d 149, 150 (C.A. 9).[5]

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[5] There is no question that Mussro's conduct was within the scope of his general authority, and thus attributable to the Union. *Schauffler* v. *Highway Truck Drivers*, 230 F. 2d 7, 12 (C.A. 3); *N.L.R.B.* v. *Denver Building Trades & Construction Council*, 193 F. 2d 421, 423, 424 (C.A. 10).

Moreover, the evidence shows (pp. 4-5) that, throughout this period, the Union's goal in picketing Crook was to obtain recognition as the representative of its employees. Thus, the picketing of Crook's premises had commenced about February 17, 1955, and it ceased on March 3, as soon as Crook agreed to a Board-conducted representation election. However, about March 9, after Crook's employees had rejected the Union in that election, the picketing of Crook was resumed, and on March 30 it was augmented by the Crowell & Larson work stoppage. This was followed by the Union's letter to Crook and the other employers requesting a bargaining conference, and by Union representative Seymour's specific request to Crook's chief stockholder, W. G. Crook, "for an agreement with us and a contract as to our labor situation" (p. 5). In these circumstances, it was reasonable for the Board to conclude that the employees of Crowell & Larson were induced to stop work for the additional object, prohibited by Section 8 (b) (4) (B) of the Act, of exerting secondary pressure on Crook to recognize the Union despite its lack of a Board certification.

The Union's contrary contentions are without merit:

1. Before the Board the Union contended that the Crowell & Larson employees remained away from their work, not because of the Crook employee, but because they were occupied in having their Union cards checked by Mussro and in conferring with him on personal matters; and, moreover, that the delay was due to Foreman Dias' failure to direct them to return to work. However, prior to checking the cards, Mussro had made it plain to the employees that they were not to work so long as Crook's employee was there, and the card-check itself could not explain a one-hour delay for *all* of the

employees.[6] Nor might the Union shield itself behind the foreman's passivity, for the Union itself had compelled it. Thus, Mussro had threatened Dias with a shutdown, and had him stand aside and refrain from directing any resumption of work until Mussro himself gave the order (R. 226). Meanwhile, Mussro's previously issued direction to the employees was in effect as the underlying cause of the stoppage. Finally, Foreman Dias' lack of responsibility for the delay in returning to work is confirmed by the fact that, thereafter, Crowell & Larson deducted an hour's wages from each of the men for an unauthorized work stoppage (p. 4).

2. The Union also sought to excuse the stoppage on the ground that it was "at best . . . merely a sporadic momentary failure to return to work." But, as the Board properly noted (R. 35), "the determination as to whether a union has violated the Act by inducing a proscribed work stoppage does not depend upon the duration of the stoppage." Indeed, the mere attempt of a union to bring about a work stoppage contrary to the Act's provisions is enough to make out the statutory violation, even though such effort were not at all successful. *N.L.R.B.* v. *Associated Musicians of Greater New York*, 226 F. 8d 900, 904-905 (C.A. 2), cert. den., 351 U.S. 962. In any event, far from being too trivial for notice by the Board or this Court, the work stoppage was "executed with all the precision of a military operation, and the illegal procedure adopted was so

[6] Mussro admitted that he ordinarily checked but one card at a time, leaving all the other employees free to do their work (R. 33; 138). Furthermore, his effort to show that his card check had been prolonged by discussions with certain individual employees was contradicted by the testimony of Union members credited by both the Trial Examiner and the Board (R. 33, 13; 132-133. Compare R. 139, 86-87, 98-99).

completely successful" in bringing home to Crowell & Larson the need to heed the Union's declared displeasure with Crook "that attempts to do the same thing again were unnecessary" (*N.L.R.B.* v. *Local 140, United Furniture Workers,* 233 F. 2d 539, 540 (C.A. 2)).

3. On no firmer ground is the Union's contention that it did not have the recognition objective proscribed by Section 8 (b) (4) (B) because it was picketing Crook to protest an alleged discriminatory discharge of 10 employees on February 15, and also the performance by nonunion employees of work which had been awarded to its members by the American Federation of Labor (R. 42-43; 149-150). There was no occasion for the Union to protest against any discriminatory charges for, as the Board found, the employees had never been discharged. They were merely laid off; had thereafter been permitted, as regular employees, to vote in the consent election of March 9 without Company challenge; and were being called back to work as business conditions permitted (R. 43; 155). Furthermore, the fact that the picketing stopped when Crook signed the election agreement although the alleged discriminatory discharges had only recently taken place, and it resumed as soon as the Union lost the election (*supra,* p. 3), indicates that the Union's picketing and other actions were not geared to the layoffs but to obtaining recognition from Crook despite the adverse election results.

The Union's contention that it sought to protest the performance by nonunion employees of work which the rules of its parent organization accorded to its members is negated by the fact that the record reveals occasions where employees of neutral employers were induced to

withhold their services even though the repair or maintenance of equipment operated by the Union's members was not involved (R. 43, 10-12, 13-14; 239-244, 253-257).[7] Moreover, as the Board pointed out (R. 43), "an intra-union ruling cannot constitute a defense to unlawful conduct."[8] That is, even if the Union were in part motivated by the intra-union award, this would not insulate the work stoppage involving Crowell & Larson's employees for the evidence previously summarized (pp. 2-5, *supra*) demonstrates that the prohibited goal of forcing recognition from Crook was at least a further object of the work stoppage. See *N.L.R.B.* v. *Local 74,* 341 U.S. 707, 713.

B. The Union's inducement of the employees of McCammon-Wunderlich

The Board's conclusion that the Union's inducement of the McCammon-Wunderlich employees was also violative of Section 8(b)(4)(A) and (B) is likewise fully supported by the evidence. The evidence shows (pp. 7-8), that, on May 24, 1955, Shepherd employee Sterling went to the job site of McCammon to service

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[7] Thus, on April 19, 1955, when Crook, at a railroad company dock, was about to deliver equipment from a flat car to an employee of Paving Materials Company, the Union's vice president told the employee that the goods were "hot" because the Union was then picketing the Crook yard (R. 10-12; 99-102, 105-108). Informed by the employee that he would not go through a picket line to take delivery, the Union representative took up a picket sign and the employee left without the equipment (R. 11-12; 103-105, 108-109). Although finding that this incident occurred and relying on it for the purpose of negating the Union's defense, the Board found it unnecessary to go further and determine whether the Union's conduct in this instance was violative of the Act (R. 43).

[8] See *N.L.R.B.* v. *Philadelphia Iron Works*, 211 F. 2d 937, 940-941 (C.A. 3); *Communications Workers of America, CIO* v. *N.L.R.B.*, 215 F. 2d 835, 838 (C.A. 2).

some equipment previously obtained from Shepherd. Union Steward Hunter, citing the fact that the Union was then picketing Shepherd, told Sterling that he would close the job down if Sterling did repair work there. Hunter then went about the project, signalling the McCammon equipment operators to halt. He also threatened a crane operator with a heavy fine if he worked while the Shepherd truck was on the site. The McCammon employees went back to work only when management had Sterling leave, and Hunter, in turn, had told the men they might resume work. Moreover, when McCammon Superintendent Waggoner later called the Union office to protest the work stoppage, he was told by Union representative Seymour, whose voice he knew (R. 67), that the Union would not permit Shepherd employees to work at the project while the Union was picketing Shepherd. Seymour added that McCammon might not turn to Shepherd for the services called for under the latter's warranties on the equipment it had sold McCammon, nor for needed parts.

On these facts, it is manifest that the Union induced and encouraged a work stoppage of McCammon-Wunderlich's employees, with an object of causing McCammon-Wunderlich to stop using Shepherd's products and to cease doing business with Shepherd, thereby violating Section 8 (b) (4) (A) of the Act.[9]

Similarly, it is apparent that a further object of this work stoppage was to exert secondary pressure on

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[9] Hunter's actions, as the Board found (R. 36, n. 8), were clearly within the scope of his employment as Union steward. *N.L.R.B.* v. *Shingle Weavers' Council*, 211 F. 2d 149, 150 (C.A. 9). And, as shown by Seymour's conversation with Waggoner, *supra*, the Union specifically ratified Hunter's actions.

Shepherd to recognize the Union as the representative of its employees, contrary to Section 8 (b) (4) (B) of the Act. Thus, for several months prior to the McCammon incident, the Union had been attempting to obtain a contract from Shepherd covering its employees (pp. 5-6). It made its first demands in early 1955, but backed away in April when Shepherd petitioned the Board for a representation election. However, as soon as the petition was dismissed, the Union tried to induce Shepherd's employees to attend a meeting for the purpose of discussing representation by the Union, and dispatched a letter to Shepherd and other employers requesting a bargaining conference and pointing out the Union's previous difficulties in entering into negotiations through one of the Shepherd partners. Shepherd thereupon (May 15) filed another representation petition with the Board, which was again met by a Union disclaimer of interest. However, when Shepherd then withdrew this petition, the Union, on May 23, demonstrated that it was still seeking to represent Shepherd's employees by setting up pickets around Shepherd's yard. Against this background, when the Union, the next day, induced the McCammon-Wunderlich work stoppage, which was avowedly directed against Shepherd, it necessarily follows that a purpose thereof was to further its goal of obtaining recognition from Shepherd without a Board certification.

As with the Crowell-Larson incident, the Union's contentions do not impair the foregoing conclusions respecting its inducement of the McCammon-Wunderlich employees:

1. Before the Board, the Union contended that the stoppage of work by the McCammon employees was entirely spontaneous and that Steward Hunter had no

part in it. In support of this contention, the Union adduced testimony from employees Luther and Thomason, who stated that, in consequence of prearrangement among the men themselves, various operators had driven around giving the thumbs-up signal when the Shepherd truck appeared and that Hunter was not even in sight. The Board and Trial Examiner, finding the testimony of these witnesses to be vague and contradictory as to the identity of the operators who had so agreed, properly declined to credit it, accepting instead Foreman Green's statement that Hunter had in fact given a "thumbs-up" signal to the men (R. 18-19, 37). The propriety of this decision is reinforced by the fact that the Union failed to call Steward Hunter to testify (R. 37). *N.L.R.B.* v. *Radcliffe,* 211 F. 2d 309, 315 (C.A. 9), cert. den., 348 U. S. 833; *Interstate Circuit* v. *United States,* 306 U.S. 208, 226. Moreover, even if Hunter did not induce Luther and Thomason, there was Union inducement by virtue of Hunter's threat to the crane operator that he would be fined $100 unless he stopped working while the Shepherd truck was present (p. 7, *supra*).

2. The Union also contends that the crane operator whom Hunter threatened with a fine ceased work only after his foreman, Green, advised him to obey the steward's order; hence, the crane operator's stoppage resulted from direction by management, rather than the Union. This contention fails for two reasons. First, regardless of what management did afterwards, the Union's prior order to the crane operator was in itself violative of the Act. Second, as the Board found (R. 38), it is apparent that Hunter's threat to the employee was the true cause of his ceasing work. In the circumstances here, the foreman's advice to the em-

ployee to avoid the fine by obeying the existing Union order could not be regarded as employer acquiescence in the Union's demands, but was merely an effort to spare the employee from the penalty threatened by the Union.

3. The Union seeks to avoid the Section 8(b)(4)(B) finding by arguing, as in the case of Crook, that it picketed Shepherd merely to protect its grant from the American Federation of Labor of jurisdiction over work which was being done by nonunion Shepherd employees. For reasons previously given (pp. 15-16), such a state of facts, even if true, does not make out a defense, and the Board, in addition, properly found the contention unconvincing in the light of the entire record.

II.

The Board Properly Concluded that the Commerce Facts Respecting the Businesses of Crook and Shepherd Were Established by Competent Evidence

In finding that Crook and Shepherd were in commerce (n. 3, *supra*), the Board relied upon testimony of the general manager of Crook and the assistant general manager of Shepherd, each of whom spoke from personal knowledge of his company's operations, that its interstate business exceeded named amounts. The Board has accepted such proof in a large number of cases, and the propriety of doing so has customarily been recognized by the parties involved. Respondent, however, contended before the Board that this kind of testimony was of no probative value because it is not the best evidence of the commerce facts, consisting only of uncorroborated hearsay conclusions and opinions. We submit that the Board properly rejected this contention.

Since the witnesses occupied responsible positions and the very nature of their duties made them familiar with the matters about which they testified, their testimony was entirely competent and admissible for the purpose for which it was offered. See *Dixie Terminal Company,* 102 NLRB 1452, 1456-1464, enforced 210 F. 2d 538 (C.A. 6), cert. den., 347 U.S. 1015; *Amalgamated Meat Cutters,* 81 NLRB 1052, n. 1. Moreover, Section 10(b) of the Act provides that the Board shall conduct its proceedings "so far as practicable" in accordance with the rules of evidence applicable in Federal district courts under the rules of civil procedure. This provision does not require rigid Board application of the best evidence rule. *2 Legislative History of the National Labor-Management Relations Act, 1947,* p. 1592; 93 Cong. Rec. 6517 (Senator Taft). In any event, it would appear that the evidence was admissible even under the best evidence rule itself, since it went to prove, not the exact amount of the commerce which was involved, but only the fact that the respective firms were engaged in commerce. This was "something independent of the detailed terms of the account books, and therefore provable without production [of records]." Wigmore on Evidence. 3rd Ed., Sec. 1244(4), citing authorities. See also, *Id.,* Secs. 1230, 1385(3), 1385a.

The facts in *N.L.R.B.* v. *Haddock Engineers, Ltd.,* 215 F. 2d 734 (C.A. 9), relied on by the Union, are distinguishable because, as the Board noted (R. 3, n. 2) "the data upon which jurisdiction was premised in that case was presented in written form, and the individual who had prepared the written material was not under oath nor available for cross-examination." Here, on the other hand, the facts were adduced solely through the testimony of witnesses, whom the Union had full oppor-

tunity to cross-examine. It not only failed to do so, but also failed to present any witnesses of its own to rebut the testimony of the responsible company officials.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.

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OCTOBER, 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

* * * * *

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9;

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board

> (A) By an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or
>
> * * * * *
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of repre-

sentation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any cir-

cuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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